BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROY E. HALL (Deceased)	)	
Claimant	)	
	)	
VS.	)	
	)	
PROSTAR, L.L.C., and	)	
STAR XPRESS, L.C.	)	
Respondents	)	Docket No. 1,012,310
	)	
AND	)	
	)	
CONTINENTAL WESTERN INSURANCE	)	
COMPANY	)	
Insurance Carrier	)	
	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Kansas Workers Compensation Fund (Fund) requested review of the March 18, 2005, Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Appeals Board (Board) heard oral argument on September 27, 2005.

APPEARANCES

Lyndon W. Vix, of Wichita, Kansas, appeared for Brittany Marie Ann Hall, minor daughter of the decedent, Roy E. Hall (claimant). Edward D. Heath, of Wichita, Kansas, appeared for respondent Star Xpress, L.C. (Star Xpress) and Continental Western Insurance Company (Continental Western), its insurance carrier. Richard J. Liby, of Wichita, Kansas, appeared for the Fund. Bradley Allen, its President, appeared for ProStar, L.L.C. (ProStar)

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. Also, during oral argument to the Board, the parties agreed that Star Xpress was the proper named corporate entity and that Star Pavilion No. 1, L.C., should be dismissed from this proceeding.

ISSUES

The ALJ found that ProStar was the employer of the deceased claimant and was liable for all death benefits to claimant's wholly dependent child. ProStar was uninsured at the time of the deceased claimant's accident, and the Fund was ordered to pay the liability of ProStar.

The Fund appeals, claiming that although claimant was an employee of respondent ProStar, at the time of the accident claimant was working for respondent Star Xpress. Therefore, the Fund contends that Star Xpress should be liable for all benefits in this claim.

Claimant argues that Star Xpress was a special employer of claimant and, accordingly, Kansas law requires that both Star Xpress and ProStar be held liable for the death benefits of claimant.

Star Xpress requests that the ALJ's Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds and concludes that at the time of his fatal accident, claimant was an employee of both ProStar and Star Xpress for purposes of the Workers Compensation Act.

On May 15, 2003, claimant died as the result of a work-related accident while employed at ProStar, an uninsured employer. At the time of the accident, claimant was working on the premises of a business owned by Star Xpress. Per an agreement between ProStar and Star Xpress, claimant worked several hours a day for Star Xpress, and Star Xpress would pay ProStar claimant's hourly wage for those hours.

Kimberly Taylor, claimant's ex-wife, testified that as a result of their marriage, one child, Brittany, was born on August 15, 1992. Claimant had two other children from a previous marriage, both of whom had reached their age of majority before claimant's death. Ms. Taylor had primary custody of Brittany, and claimant paid child support for Brittany and had visitation rights.

Bradley Allen is the President and owner of ProStar, a limited liability corporation he started in April 2002. ProStar sold pressure washers, extractors, soaps, polishes, and

advertising and promotional items, as well as serviced the equipment it sold. Primarily, its customers were car dealers, service centers, and car wash businesses. When Mr. Allen first started his business, he would install and repair the equipment he sold. Eventually, Mr. Allen wanted to hire someone to provide service to customers, but he did not have enough work to keep an employee busy full time. In early 2003, Mr. Allen met with David Hanning, owner of Star Xpress, one of ProStar's customers, to discuss the possibility of hiring someone to provide service work on the car wash equipment. Mr. Allen and Mr. Hanning decided that between the two businesses, they would have enough work to keep an employee busy full time. At the time, Mr. Allen was thinking of claimant as a prospective employee.

Soon thereafter, Mr. Allen, Mr. Hanning and claimant met to discuss claimant's possible employment at ProStar. Mr. Allen had already decided he wanted to hire claimant but wanted claimant and Mr. Hanning to meet so Mr. Hanning could approve claimant's hiring. At the meeting, the three discussed a split of claimant's time and decided that claimant could work for Mr. Hanning at Star Xpress for five hours a day and for Mr. Allen at ProStar for three hours a day. Mr. Allen did not offer claimant a job at the conclusion of the meeting because he wanted to review the meeting with Mr. Hanning. Mr. Hanning was concerned about whether claimant would agree to cover after hours and weekend services. Mr. Allen discussed this concern with claimant, and claimant agreed to be available for after hours and weekend work. Mr. Allen called Mr. Hanning with this information, and Mr. Hanning ultimately gave his approval to hire claimant. Mr. Allen then called claimant and let him know he was hired. Mr. Allen testified that his agreement with Mr. Hanning was that if Mr. Hanning became dissatisfied with claimant, their agreement would be terminated. Claimant was told the terms of this agreement.

The arrangement between Mr. Hanning and Mr. Allen was that ProStar would bill Star Xpress for the hours claimant worked, and ProStar would pay claimant. Claimant was being paid $13.75 per hour by ProStar, and ProStar billed Star Xpress for claimant's services at the rate of $13.75 per hour. ProStar was not making a profit in this agreement; and after employee expenses and bookkeeping were taken into account, ProStar was actually losing money on the arrangement. When asked whether claimant's services to Star Xpress was a loss leader to get Mr. Hanning's soap account, Mr. Allen testified that he felt ProStar had already earned the soap business and the agreement was made because he wanted some technical service help.

While claimant worked for ProStar, Mr. Allen would send him on service calls to other customers. Claimant's work for other customers was billed from $55 to $65 an hour. Mr. Allen stated that the agreement with Mr. Hanning was that claimant was an employee of ProStar. There were days in which claimant would work for Star Xpress for an entire day, and then Mr. Allen would have claimant for the next couple of days. Mr. Allen stated that after about two or three weeks, Mr. Hanning came up with a plan that claimant work for Star Xpress from 8:00 a.m. to 2:00 p.m., which would fulfill his five hours per the agreement. After 2:00 p.m., claimant would work for ProStar. First thing in the morning,

claimant would report to Mr. Hanning's business to get instructions on work that needed to be done. During the period from 8:00 to 2:00, claimant would not use tools provided by ProStar, and Mr. Allen had no control over claimant's activities while claimant was working for Star Xpress. Before the 8:00 a.m. to 2:00 p.m. plan was put into effect, Mr. Allen would call claimant off of work for Mr. Hanning to send him on service calls for ProStar's other customers, but he did not recall doing this after initiating the 8:00 a.m. to 2:00 p.m. plan. Mr. Hanning never called claimant off ProStar's time after 2:00 p.m. Mr. Allen testified he had no control over claimant's activities between 8:00 a.m. and 2:00 p.m. However, on cross-examination, Mr. Allen testified that he had the right to pull claimant away from his duties at Star Xpress and send him somewhere else during the hours of 8:00 a.m. and 2:00 p.m., but that he would have checked with Mr. Hanning to make sure it worked out with him.

Although claimant had agreed to work after hours and on weekends, Mr. Hanning was concerned because claimant, after being employed, was not meeting his expectations for this after-hour and weekend work. Mr. Allen told claimant that his employment was contingent upon Mr. Hanning being happy. Mr. Hanning and Mr. Allen met to discuss this problem about a week before claimant's death. Mr. Allen had decided that claimant's employment was not going to work out because claimant was unwilling to meet Mr. Hanning's employment needs. Mr. Allen testified that Mr. Hanning had the right to tell claimant that he could no longer work for Star Xpress. If that would have occurred, Mr. Allen would have had to terminate claimant because he did not have enough work to keep him busy full time.

At the time of the accident, claimant was changing a light bulb at one of Mr. Hanning's car washes. According to Mr. Allen, Mr. Hanning would have been the one to tell claimant to go to that particular car wash and to change the lightbulb. The ladder from which claimant fell belonged to Mr. Hanning. ProStar was not benefitted by claimant changing the lightbulb at Mr. Hanning's business.

Mr. Allen testified that claimant was ProStar's first employee. He stated that he had not estimated ProStar's total gross payroll to be greater than $20,000. However, he admitted that if claimant had not died and had continued working for ProStar, ProStar's gross annual payroll would have been over $20,000. Mr. Allen testified that ProStar would have to take bankruptcy if it was ordered to make the workers compensation death benefit payments to claimant's daughter.

David Hanning is the managing member of Star Xpress, a limited liability corporation. Mr. Hanning testified that claimant was not a Star Xpress employee, nor was he ever intended to be an employee. Mr. Hanning stated that he met claimant in January 2003. Mr. Hanning testified that Mr. Allen wanted to expand ProStar to include service work because of the profit margin allowed in service work, and Mr. Allen wanted Mr. Hanning's opinion on claimant's capabilities. Mr. Hanning previously had a service technician, but that individual had been terminated from his employment in November

2002. Prior to meeting with claimant, Mr. Allen and Mr. Hanning had discussed a general situation in which if Mr. Allen could find a qualified service technician, Star Xpress would contract with ProStar to have the service technician do some of Star Xpress' maintenance. Mr. Hanning acknowledged that the arrangement for Star Xpress to contract with ProStar for claimant's labor was a good deal for Star Xpress, because it would have cost Mr. Hanning much more than $13 to $15 an hour to have a service technician do his maintenance work.

After Mr. Hanning's first meeting with Mr. Allen and claimant, two months passed while Mr. Allen tried to convince claimant to come to work for ProStar. Sometime in early March 2003, Mr. Hanning was told that claimant was willing to quit his current employment and begin work at ProStar.

Mr. Hanning testified that he and Mr. Allen, and occasionally claimant, would meet to review a list of projects needed to be done at Star Xpress businesses. Generally, though, Mr. Hanning would catch up with claimant and would let him know the next couple of projects he wanted claimant to work on. Mr. Hanning testified that he relied on claimant's expertise to perform the work he wanted done, and claimant furnished his own truck and tools. He further testified that he did not know on an average how many hours claimant would work on his projects, when claimant would start working, or when he would quit. He did not tell claimant when to arrive at work or when to leave work. He stated his only concern was whether the work was being accomplished. Mr. Allen would occasionally call Mr. Hanning to indicate he needed claimant to work for another customer, and Mr. Hanning would tell him that as long as his projects were accomplished, it was alright with him. In response to Mr. Allen's testimony that claimant was to work for Star Xpress five hours a day and ProStar three hours a day, Mr. Hanning testified that he made no such agreement, that he didn't care whether claimant worked one hour a day or ten, as long as the work was completed.

Mr. Hanning's version of his agreement with Mr. Allen was that Mr. Allen needed a service technician to enhance his business, and since he could work into the deal to supply his needs, then it would be a "great union."[1] According to Mr. Hanning, the agreement was never that claimant would work part-time for Allen and part-time for Hanning; claimant was never an employee of anyone but ProStar.

Mr. Hanning testified that he and Mr. Allen discussed workers compensation for claimant, and Mr. Hanning told Mr. Allen that since claimant was an employee of ProStar, ProStar would be responsible for liability and workers compensation insurance. Mr. Hanning testified that Mr. Allen indicated he intended to obtain that coverage.

[1] Hanning Depo. at 76.

Kansas has long recognized that for purposes of the Workers Compensation Act, a worker can be the employee of more than one employer at the same time. And when an employer lends a worker to another employer, the worker can look to either employer or both for workers compensation benefits.[2]

> Where a general employer loans his workman to another and directs him to do certain work which is being done under the supervision and control of such other or special employer, and which work is also a part of the general employer's trade or business in which injuries are compensable under the compensation act, and the workman continues at all times in the employ of the general employer who pays his compensation and who remains vested with full power to discharge him for refusal to do the work for the special employer which he was directed to do, such employee, if injured while engaged in such work, may look to both employers and their respective insurance carriers for compensation.[3]

> It is impossible to lay down a rule by which the status of a person performing a service for another can be definitely fixed as an employee, as ordinarily no single feature of the relation is determinative, but all must be considered together and each case must depend on its own peculiar facts. A number of factors have evidentiary value, the most important of which is the degree of control retained by the person for whom the work is being done. In order to determine the actual relationship of the parties under any employment, the courts will look to all the circumstances involved in the particular case.[4]

In addition to holding that no single fact is conclusive in determining the nature of the relationships between the parties in a workers compensation case, the Kansas Supreme Court has also held that an express contract is not required to prove a contract of employment. Instead, the conduct of the parties is sufficient to disclose an agreement between an employer and employee. The Kansas Supreme Court in *Casebeer*[5] stated, in part:

> Respondent and his carrier also argue that there was no contract of employment as to claimant's work as a welder and laborer.
>
> In determining the actual relationship of parties under the Workmen's Compensation Act courts do not regard a single fact as conclusive but will look at

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[2] See *Scott v. Altmar, Inc.*, 272 Kan. 1280, 1283, 38 P.3d 673 (2002); *Bendure v. Great Lakes Pipe Line Co.*, 199 Kan. 696, 701, 433 P.2d 558 (1967); *Bright v. Bragg*, 175 Kan. 404, Syl. ¶ 3, 264 P.2d 494 (1953); and *Mendel v. Fort Scott Hydraulic Cement Co.*, 147 Kan. 719, Syl. ¶ 4, 78 P.2d 868 (1938).

[3] *Mendel*, 147 Kan. 719, Syl. ¶ 4.

[4] *Bendure*, 199 Kan. at 703-04, citing *Mendel*, 147 Kan. at 722.

[5] *Casebeer v. Casebeer*, 199 Kan. 806, 810-11, 433 P.2d 399 (1967) (citations omitted).

> all the facts and circumstances involved in a particular case. Our Workmen's Compensation Act does not require an express contract to establish its existence, the conduct of the parties being sufficient to disclose an agreement.

Moreover, when a general employer lends an employee to a second employer, the second employer becomes liable for workers compensation benefits only if (1) the employee has made a contract of hire, express or implied, with the second employer, (2) the work being performed is essentially that of the second employer, and (3) the second employer has the right to control the details of the work.[6]

Considering all the facts and circumstances, the Board concludes both ProStar and Star Xpress entered into a contract of employment with the claimant. Both ProStar and Star Xpress had a say in determining when and how long the claimant would work for each and both had the authority to terminate the claimant. Both controlled the claimant's day-to-day activities and the details of the work that he performed. Consequently, under the principles set forth in the above-cited cases regarding general and special employers, Star Xpress borrowed the claimant to advance its business interests. Thus, claimant was an employee of both ProStar and Star Xpress on the date of accident and was performing services that advanced the business interests of both. Consequently, claimant's surviving minor child is entitled to pursue workers compensation benefits from either or both employers.

The Board acknowledges ProStar and Star Xpress may have contracted that ProStar was responsible for obtaining the workers compensation insurance coverage on claimant. But that is a private contract matter between ProStar and Star Xpress that may be enforced in a court of competent jurisdiction. That contract does not restrict the rights of claimant's surviving minor child to pursue this claim against both employers under the Workers Compensation Act. Consequently, the claimant's surviving minor child may pursue benefits from both employers, which she has done.

There has been no argument made that Continental Western was denying or disputing coverage in the event the Board determined claimant was Star Xpress' employee on the date of accident. In addition, the Fund does not contest that ProStar is financially unable to pay an award of death benefits to the claimant's surviving minor child and that ProStar lacked workers compensation insurance coverage on the date of accident. Accordingly, the Fund is liable under K.S.A. 44-532a, which requires the Fund to pay benefits when the employer both lacks insurance coverage and is financially unable to pay compensation. Consequently, the award entered in these claims should be against Star

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[6] *Scott*, 272 Kan. at 1384; *Bendure*, 199 Kan. 696, Syl. ¶ 5.

Xpress and its insurance carrier, Continental Western, ProStar, and the Fund, jointly and severally.[7]

As the Board has determined that claimant was an employee of both ProStar and Star Xpress on the date of accident, and that those employers are jointly and severally liable for the benefits that are due in these claims, the Board also concludes that those employers, together with Continental Western and the Fund are jointly and severally liable for the benefits awarded and the administrative costs incurred in this claim.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated March 18, 2005, is modified to find ProStar, L.L.C., and Star Xpress, L.C., and its insurance carrier, Continental Western Insurance Company, and the Kansas Workers Compensation Fund jointly and severally liable for the awarded benefits and costs.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of October, 2005.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Lyndon W. Vix, Attorney for Claimant

[7] *See Kuhn v. Grant County*, 201 Kan. 163, 439 P.2d 155 (1968); *American States Ins. Co. v. Hanover Ins. Co.*, 14 Kan. App. 2d 492, 498, 794 P.2d 662 (1990).

Edward D. Heath, Attorney for Respondent Star Xpress L.C. and its Insurance Carrier
Richard J. Liby, attorney for Kansas Workers Compensation Fund
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